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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968
NO. 25

J.C.FAIRLEY, et al.,
Appellants,

-vs-

JOE T. PATTERSON, et al.,
Appellees.

LEVI MARSAW, III, et al.,
Appellants,

-vs-

JOE T. PATTERSON, et al.,
Appellees.

On Appeal From a District Court of Three Judges,
United States District Court for the Southern
District of Mississippi.

# BRIEF FOR APPELLANTS

## OPINIONS BELOW

The order in *Fairley* is reported at 282 F. Supp. 164. The order in *Marsaw* is not reported. The orders are reprinted in appellants' separate appendix (A. 28-29, 80-81).*

* "A" refers to the portions of the record printed as a separate appendix by appellants. Appellants will also refer to an appendix printed in the back of this brief.

## JURISDICTION

The District Court entered a judgment in *Marsaw* on October 4, 1967 and in *Fairley* on October 5, 1967. The Notice of Appeal in each case was filed on November 28, 1967.

The jurisdiction of the court below was based on 28 U.S.C. § § 1343(3) and (4), 2201 and 2202 and on 42 U.S.C. § § 1971(d), 1973c(j) and (f). A three-judge district court was required by 42 U.S.C. § 1973c and 28 U.S.C. § 2281.

The Supreme Court has jurisdiction of this direct appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

## STATUTES INVOLVED

The statutes involved are Section 5 of the Voting Rights Act of 1965, 42 U.S.C., § 1973c, Section 14(c)(l), 42 U.S.C. § 1973 1(c)(1), and § 2870 of the Mississippi Code of 1942, prior to its amendment in 1966, and as amended in 1966. These statutes are printed in Appendix A *infra* of appellant's brief.

## QUESTIONS PRESENTED

1. Whether the three-judge court below was properly convened pursuant to 42 U.S.C. § 1973c and whether appellants, as private parties, had a right to sue therein.

2. Whether § 2870 of the Mississippi Code, as amended in 1966, allowing Adams and Forrest Counties to switch to at-large elections prior to the November 7, 1967, elections of the members of the Board of Supervisors of those counties, bears a sufficient relationship to "voting" as that term is used within Sections 5 and 14 of the Voting Rights Act of 1965, as to have required the submission of the 1966 amendment to the Attorney General of the United States or the United States District Court for the District of Columbia.

3. Whether, the November 7, 1967, elections for the members of the Board of Supervisors having been held at large pursuant to the 1966 amendment of § 2870 of the Mississippi Code, this Court should direct new elections for the Supervisors in each district of the two counties in accordance with §2870 prior to its amendment.

## STATEMENT OF THE CASE

Prior to May 27, 1966, each of the Members of the Board of Supervisors in each of the Counties of Mississippi, including Adams and Forrest Counties (the counties bringing the appeal herein) was elected by the qualified electors from their respective districts pursuant to Section 2870 of the Mississippi Code and Article 6 §170 of the Constitution of Mississippi. (See appendix A attached to this brief for the statute and its later amendment). Effective May 27, 1966, the Legislature of Mississippi amended § 2870 to provide that the Board of Supervisors of any County could adopt an order providing that all of

the members of the County Board of Supervisors be elected at large by all the qualified electors of the County. The Board of Supervisors of Adams and Forrest Counties adopted ordinances providing for elections of the members of their County Supervisors by all the qualified electors of the County (A. 7, 13, 36, 45-46, 50-53). Elections were held on November 7, 1967, in Adams and Forrest Counties in which all the qualified electors of each county were eligible to vote for each member of the Board of Supervisors by County.

The Voting Rights Act of 1965 applies to Mississippi and provides in Section 5, 42 U.S.C. § 1973c that whenever a State or political subdivision thereof:

> "shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964,"

such State or political subdivision cannot enforce or apply such change until it has either (1) instituted an action in the United States District Court for the District of Columbia for a declaratory judgment that

> "such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. § 1973c)

and such judgment has been entered, or (2) submitted the change to the Attorney General of the United States and had no objection interposed by the Attorney General within 60 days after such submission.

Neither the State of Mississippi, nor any of its officials, nor Adams, or Forrest Counties (in which the named appellants reside), nor any of their officials has instituted any action in the United States District Court for the District of Columbia with respect to § 2870 of the Mississippi Code, as amended, nor submitted such amendment to the Attorney General of the United States (A. 8, 14, 38, 47).

Appellants are Negro qualified electors and potential candidates for a position as a member of the Board of Supervisors in Forrest and Adams Counties, Mississippi. They represent a class of persons similarly situated (A. 2, 34). In both suits, appellants seek to have the 1966 amendment to § 2870 of the Mississippi Code declared such a change in "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting," within the purview of Section 5 of the Voting Rights Act of 1965, as to require appellees to comply with Section 5. Appellants also seek injunctive relief, restraining appellees, their agents, employees, successors and persons in concert with them from enforcing, implementing or otherwise giving effect to §2870 of the Mississippi Code, as amended until appellees have complied. At the time of the filing of these suits, prior to the holding of the November 1967 elections, appellants prayed for an order

enjoining the election pursuant to § 2870 as amended in 1966, of members of the Board of Supervisors in their respective counties, and for an order requiring appellees to hold an election pursuant to §2870 as in effect prior to its amendment in 1966, to fill said positions in November 1967 (A. 10-11 40-41). Since the elections held in November 1967 should have been held pursuant to § 2870 as in effect prior to its amendment in 1966 and not pursuant to § 2870 as amended in 1966, appellants now pray for an order setting aside said elections of members of the Adams and Forrest Counties Board of Supervisors and directing the holding of elections for these positions in accordance with §2870 prior to its amendment.

Appellants prayed further that a three-judge district court be convened pursuant to 28 U.S.C. § § 2281 and 2284 and 42 U.S.C. § 1973c (A. 10, 40). A three-judge district court held that the 1966 amendment did not come within the purview of and is not covered by the Voting Rights Act of 1965 and dismissed the complaints (A. 28-29, 80-81).* This appeal followed.

## SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal because a three-judge district court was properly convened below in accordance with Section 5 of the Voting Rights Act of 1965. The language of the last sentence of Section 5 and

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* The complaints in each of these cases originally contained a second claim for relief based on the Fifteenth Amendment. Appellants withdrew this claim for the purpose of expediting the hearing in to order to secure relief in time for the November 1967 elections.

the place of this language in the section support appellants' conclusion of the propriety of a three-judge district court action here. In addition, the purposes of the Voting Rights Act in particular, and of three-judge district courts in general, support appellants' position.

There is a clear controversy in this case between the State of Mississippi which has failed to comply with its duty to submit the 1966 amendment of § 2870 of the Mississippi Code, a law which permits the change of electing County Supervisors by district to at large, to either the Attorney General of the United States or the United States District Court for the District of Columbia in accordance with Section 5 of the Voting Rights Act of 1965. Appellants, who have been injured by appellees' failure to comply with its statutory duty, have a right to compel such compliance.

The issue before this Court is whether the 1966 amendment is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of Section 5 of the Voting Rights Act. Appellants contend that the language of Sections 5 and 14 of the Act, its legislative history and its broad purpose to finally achieve the guarantees of the Fifteenth Amendment compel the conclusion that the amendment to § 2870 relates to the effectiveness of appellants' right to vote within the meaning of the Voting Rights Act. Whether the amendment actually discriminates against appellants is not before this Court. As long as the Act involves the effectiveness of appellants' right to vote, Mississippi, a state covered by the Act, must submit the law for approval.

Accordingly, appellants respectfully request this Court to set aside the elections held in Forrest and Adams counties pursuant to said 1966 amendment and to direct the elections by District for this office which should have been held in November 1967. In addition, this Court should enjoin enforcement of the law as amended until Mississippi complies with Section 5 by submitting the new law to the Attorney General or the United States District Court for the District of Columbia.

## ARGUMENT

### I. A THREE-JUDGE COURT WAS PROPERLY CONVENED AND APPELLANTS, AS PRIVATE PARTIES, HAVE A RIGHT TO SUE IN THIS CAUSE.

#### A. A Three-Judge court was properly convened.

This Court has jurisdiction of this appeal if a three-judge court was properly convened below. 28 U.S.C. §1253, 42 U.S.C.§ 1973c. Appellants contend that the phrase "Any action under this section shall be heard and determined by a court of three judges ..." in Section 5 of the Voting Rights Act (42 U.S.C. 1973c), and its location at the bottom of said section clearly require the convening of a three-judge court for the reasons stated in the Memorandum for the United States as Amicus Curiae, pp. 8-9. Appellants would add to that discussion several points. The words "any action" and "a court of three judges" (our emphasis) are very general phrases, and suggest more than the declaratory judgment action brought by a covered State in the United States District

Court for the District of Columbia. If Congress just had this one suit in mind, it would have been natural to place the three-judge requirement in the first sentence of the paragraph. Moreover, the last sentence of the paragraph is superfluous with respect to the suit described as a "subsequent action to enjoin enforcement of such qualification ..." (following the approval of the Attorney General or the District of Columbia court of the new State law), because such an action would be under the Fifteenth Amendment and would, therefore, require a three-judge court under 28 U.S.C. § 2281 in any event. Unless the last sentence refers to a suit such as the instant cause, it has no utility whatsoever.

The purposes of the Voting Rights Act of 1965 and of three-judge courts in general support appellants' contention that all actions related to Section 5 must be heard by a three-judge court. As is shown more fully in Argument II below, the whole thrust of the Voting Rights Act is to ensure that Negroes in the South, who have been deprived of the franchise too long, are enfranchised as quickly as possible. A major purpose of Section 5 is to permit both States and private parties fast, objective and effective review of legislation affecting voting rights, so as to minimize the interference with the right to vote and state legislation. Three-judge district courts are designed to (1) expedite review by direct appeal to this Court; (2) provide greater restraint and dignity in actions seeking to enjoin the operation of state statutes; (3) reduce the possibility of intimidation in the deliberations of a single

judge; and (4) ensure a more critical and objective examination of the important case. Section 5 manifests the conclusion of Congress that a three-judge court should be required – for all of the reasons there are three judge courts– when the State is a plaintiff in an action for a declaratory judgment. The rationale applies equally to a case such as this one in which the appellants are indirectly, by seeking compliance with the Voting Rights Act, alleging a deprivation of a most basic right, the right to vote, and the State is a defendant.

### B. Appellants, as private parties, have a right to sue in this cause.

Section 12(f) (42 U.S.C. § 1973j(f)) of the Voting Rights Act of 1965 provides:

> "(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this subchapter shall have exhausted any administrative or other remedies that may be provided by law."

In addition to conferring jurisdiction, this provision implies the standing of private persons to initiate proceedings to "assert rights under the provisions of [the Voting Rights Act]." Cf. *Morris v. Fortson*, 261 F. Supp. 538, 541 n. 3 (N.D. Ga. 1966). After several references in

Section 12 to the Attorney General, Congress refers in section (f) to the assertion of rights by "a person". One must conclude that Congress, by using the general term "person" rather than "the Attorney General" contemplated suits by private parties under the Voting Rights Act. Similarly, in 28 U.S.C. § 1343, which also confers jurisdiction in this action on the federal court, the Legislature again used the very general term "any person" rather than a specific one and the implication is the same.

In the instant case, there is a clear controversy between Mississippi, which has a duty to submit certain legislation for review, and appellants, Negro citizens, whose voting rights have been impaired by the State's failure to comply with Section 5 of the Voting Rights Act. Even if a right of action by private persons were not implied by the terms of the Voting Rights Act, the courts have consistently held that a breach of statutory duty gives rise to a right of action by an injured party for whose benefit the statute was enacted. *Goodman v. H. Hentz Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); *Mack v. Mishkin*, 172 F. Supp. 885 (S.D.N.Y. 1959); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1941). Such a right emanates from the statute even though it does not expressly give a private party the right to bring an action. *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961). Judge Wisdom dealt, in *Bossier Parish School Board v. Lemon*, 370 F. 2d 847, 852 (5th Cir. 1967), with such a situation and concluded that:

"Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. . . . [T]he section is a prohibition, not an admonition. In the absence of a procedure through which individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts .... The Negro school children, as beneficiaries of the Act, have standing to assert their section 601 rights."

Even though enforcement powers have been granted to public officials, such as the Attorney General in this instance, the courts have allowed private parties to enforce their rights in order to lighten the Attorney General's burden of investigation (in this case to give him knowledge of the amendment in question), and more importantly to ensure parties whose rights are most immediately affected by noncompliance with legislation that they need not rely upon a governmental agency to protect their rights in the courts. *Dann v. Studebaker-Packard Corp., supra; Subin v. Goldsmith,* , 224 F.2d 753 (2d Cir. 1955).

Under appellee's interpretation of the Act, there is no recourse for injured persons such as appellants should the Attorney General, for whatever reason, including merely a particularly heavy workload, refuse to enforce compliance with the Act.* At that point the only remedy left to the

persons affected by what might be a discriminatory amendment is to bring a private suit based on the Fifteenth Amendment. This consequence is most serious as a suit to enforce the Fifteenth Amendment can be a monumental, difficult and expensive effort. The result is precisely what Congress meant to avoid by enacting the Voting Rights Act in response to a finding that previously existing remedies to enforce the guarantees of the Fifteenth Amendment were inadequate. *South Carolina v. Katzenbach, supra* at 309-316. Appellants conclude therefore, that as private parties they had standing to compel Mississippi's compliance with the Voting Rights Act.

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* Section 12(d) of the Act (42 U.S.C. § 1973j(d)) states in substance that when any person has violated the Voting Rights Act "the Attorney General may institute for the United States ... an action ..." (Emphasis added.) It is thus clear that the Attorney General has the discretion not to sue. It is interesting to note that the Attorney General, as of January 1968, had only once acted to force a state to comply with Section 5 (United States v. Crook, 253 F. Supp. 915 (M.D. Ala. 1966). United States Commission on Civil Rights, Political Participation, 1968, pp. 164-65.

## II. SECTION 2870 OF THE MISSISSIPPI CODE, AS AMENDED IN 1966, RELATES TO APPELLANTS' RIGHT TO VOTE AND THEREBY CONSTITUTES A STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING WITHIN THE MEANING OF SECTION 5 AND 14 OF THE VOTING RIGHTS ACT OF 1965.

### A. The Operation of Section 5 of the Voting Rights Act of 1965.

In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court broadly stated the purpose of the Voting Rights Act of 1965:

> "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. .... Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious definance of the Constitution." *Id.* at 308, 309.

Congress passed voting legislation in 1957, 1960 and 1964 which had been singularly unsuccessful. In Forrest County, Mississippi, for example,the home of appellant Fairley herein, 236 Negroes were registered to vote prior to 1965 in a county whose voting age Negro population

was 7,495.*

One part of the problem was the great ingenuity of Southern states to contrive "new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach, supra,* 383 U.S. at 335. In the time it would take for the Government to learn about such newly-adopted procedures and to litigate their validity, the new rules would have done their damage.** As Attorney General Nicholas deB. Katzenbach testified at the hearing on the bill:

> "Our experience in the area that would be covered by this bill has been such to indicate frequently on the part of the State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States." *House Hearings,* p. 60.

Congress thus officially recognized the discriminatory nature and application of previous Southern voting statutes and decreed that no future laws could become operative prior to the scrutiny of the Attorney General or

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* Report of the United States Commission on Civil Rights, supra, p. 244.

** Hearing on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter House Hearings), p. 72. Hearing on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., (hereinafter Senate Hearings) p. 237.

the District of Columbia Court.

To those familiar with the overwhelming past history of discriminatory voting legislation and practices in Mississippi, the need for the protection of Section 5 was readily apparent. As this Court observed in *United States v. Mississippi*, 380 U.S. 128, 135-136 (1965):

> "It is apparent that the complaint ... charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics ... would seem to show had been remarkably successful."

See *United States v. Lynd*, 349 F.2d 785 (5th Cir. 1965); *United States v. Mississippi*, 359 F.2d 103 (5th Cir. 1966); *United States v. Ramsey*, 353 F.2d 650 (5th Cir. 1965); *United States v. Ward*, 345 F.2d 857 (5th Cir. 1965).

Having demonstrated the extraordinary history of racial discrimination in voting in Mississippi it is hornbook law that a presumption arises that facts or conditions once proven are deemed to continue to exist unless proven otherwise. *Cassell v. Texas*, 339 U.S. 282, 293 (1950); *Allstate Finance Corp. v. Zimmerman*, 330 F.2d 740 (5th Cir. 1964); *NLRB v. Piqua Munising Wood Prods. Co.*, 109 F.2d 552 (6th Cir. 1940); 2 Wigmore, *Evidence*, Section 437 (3d ed. 1940).

New Mississippi voting statutes and practice were thus

presumed to be discriminatory. Mississippi was in effect placed on "probation" with the burden on her to prove to the Attorney General or to a District of Columbia Court the nondiscriminatory nature of the proposed statute or rule.

Congress' remedy for this pervasive and seemingly unremitting evil of voting discrimination was very strong medicine indeed. In the covered states, which includes Mississippi, Congress suspended the use of virtually all State "test or devices" with respect to voter registration. If the States failed to register Negroes without regard to race, the federal government would provide examiners to do the job.

But registration of Negroes was only part of the problem. It was necessary to protect this gain by preventing a repetition of the practice of Southern Legislatures of constantly enacting more sophisticated rules to deny or dilute the hard-won right to vote. Accordingly, Section 5 of the Act provided that no "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" could be enacted or administered before the state submitted the new statute or rule to the Attorney General of the United States for his approval. Alternatively, the State was authorized to seek a declaratory judgment from the United States District Court for the District of Columbia that the new statute or rule did "not have the purpose and ... [or] the effect of denying or abridging the right to vote on account of race or color." Justice Black, dissenting in

*South Carolina v. Katzenbach, supra,* described Section 5 as follows:

> "Section 5 goes on to provide that a State covered by §4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color." 383 U.S. at 356.

B. Section 5 applies to § 2870.

Prior to May 27, 1966, each of the five members of the Board of Supervisors were elected by the qualified electors of his particular district or beat. The amendment to § 2870 passed on that date provided the Board with discretion to adopt an at large election procedure whereby all five members would be elected by all the qualified electors of the county. The statute thus enabled the Board to issue an order relating to the weight or the effectiveness of the vote of qualified electors such as appellants herein.

There can be no question that this 1966 amendment fits literally within the "all-inclusive,"* scope of the words "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" used in Section 5 of the Voting Rights Act. The quoted phrase

* Senate Hearings, p. 192.

could hardly be broader in scope. In addition, Congress defined "voting" very generally in Section 14(c)(1) (42 U.S.C. §1973l(c)(1)) as including "all action necessary to make a vote *effective* in any primary, special or general election ..." (Emphasis added). Congress did not merely say that Section 5 encompasses all standards, practices or procedures with respect to "registration" or "tests and devices". Rather, when Section 5 and 14 (c)(1) are read together, Congress declared that all standards, practices or procedures with respect to that which makes a vote effective are covered by Section 5.*

It is clear, appellants contend, that the adoption of an at large election procedure relates to the "effectiveness" of appellants' right to vote. As this Court has stated:

> "... the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as *effectively* as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). (Emphasis added.)

Appellees respond, however, that they have a "noble" purpose, deserving of "admiration"** for they are merely attempting to comply with this Court's one man-one vote

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* The broad scope of the language was emphasized further by the proscription against new state statutes which abridge as well as deny the right to vote.

** Appellees' Response to the Memorandum for the United States as Amicus Curiae, pp. 14, 17.

rule in reapportionment cases. Initially, it should be noted that whether Mississippi's purpose is racial discrimination or a good faith attempt to comply with the requirements of reapportionment, is not the issue before this Court. That issue should be resolved by the Attorney General of the United States or the United States District Court for the District of Columbia upon Mississippi's submission of the new law. The issue before the Court below and this Court is solely whether the 1966 amendment to § 2870 relates to the effectiveness of appellants' vote.

Appellants believe that it does so relate. Indeed the granting of the power to switch to an at large election procedure creates a grave potential for abuse of that power – to the detriment of Negroes such as appellants. Prior to the 1966 amendment, the Board of Supervisors could merely redraw district boundaries. Under § 2870 as amended, however, these Supervisors also have the option to continue separate district elections or to switch to an at large procedure. Suppose we have a county such as Adams County, Mississippi, where Negroes constitute a majority of the population in certain districts, but are a minority county-wide.** Under the old system, the white supervisors might have had to complete the extraordinarily difficult process of gerrymandering district lines to continue in office the white supervisors from the Negro majority beats. With the 1966 amendment, however, the Board can adopt the at large plan and accomplish the same

** United States Census of Population: 1960, pp. 26-48.

purpose far more easily. Moreover, this racially discriminatory stroke can be achieved under the facade of attempting to comply with the one man-one vote mandate of the Constitution. As we have stated, Mississippi has a long history of racial discrimination, and as a State covered by the Voting Rights Act, is on "probation" with the burden on her to prove the nondiscriminatory motivation behind her new statutes. Thus appellees must be compelled to submit any new plan affecting voting to the Attorney General of the United States or the District of Columbia court. It is to that Court, or the Attorney General, that Mississippi should assert its claim of bona fide motivation – and go on to prove nondiscriminatory effect as well.

Appellees argue that Congress could not have intended that all changes in the covered states relating to the apportioning and districting of governmental bodies should be submitted to the District of Columbia court. On the contrary, Congress intended that any new standard, practice or procedure which relates to the effectiveness of the right to vote be submitted for review. As Attorney General Nicholas deB. Katzenbach testified during the hearings on the bill, "two or three" types of state laws could be written out of the section, but "there are precious few, because there are an awful lot of things that could be started for the purpose of evading the Fifteenth Amendment if there is a desire to do so." *House Hearings*, p. 95.

In buttressing its argument, appellees argue that requiring Mississippi to submit the 1966 amendment to the

Attorney General or the District of Columbia court "would seriously impede, if not prevent, the implementation of ...*Avery v. Midland County Texas*, 88 S. Ct. 1114." Appellees' response to the Memorandum of the United States as Amicus Curiae, pp. 13-14. Although appellees are thus conjuring up the threat of a large number of reapportionment cases for the District of Columbia court to review, there is no reason for a bottleneck to occur. All that would be required is for the covered states to submit to the Attorney General the reapportionment plans enacted after the passage of the Voting Rights Act in August 1965. If the plans have been enacted and administered without racial motivation, the Attorney General will approve them within 60 days. If unlawful motivation provoked their enactment, however, it is certainly time for their modification.

The Voting Rights Act was intended to make effective once and for all the guarantees of the Fifteenth Amendment. Since the 1966 amendment to § 2870 relates to the effectiveness of appellants' right to vote, and may well constitute a "sophisticated ... mode of discrimination"* *(Lane v. Wilson*, 307 U.S. 268, 275), this

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* There is the possibility that the Voting Rights Act may no longer cover Mississippi after 1970. Section 4(b) of the Act (42 U.S.C. § 1973b(a). Unless Mississippi is required to submit the "sophisticated modes of discrimination" laws, the enfranchisement of Negroes may well prove illusory.

Court should compel Mississippi to comply with the Voting Rights Act by submitting the law for approval.**

## III. THIS COURT SHOULD SET ASIDE THE ELECTIONS HELD PURSUANT TO § 2870 AS AMENDED, AND ORDER ELECTIONS BY DISTRICT IN ORDER TO CURE THE INJURY CAUSED BY MISSISSIPPI'S FAILURE TO COMPLY WITH THE VOTING RIGHTS ACT.

Since the District Court should have enjoined the enforcement of § 2870, as amended in 1966, and the election at large of members of the County Board of Supervisors in Adams and Forrest counties held pursuant to the implementation of said amendment until Mississippi complied with Section 5, this Court should set aside the elections held in Forrest and Adams counties pursuant to that law, enjoin its enforcement until Mississippi complies with 42 U.S.C. § 1973c, order elections by district to be held for vacant offices, and order the enforcement of §2870 prior to its 1966 amendment. In *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966), as in *Fairley* and *Marsaw*, Negro voters asked the District Court to enjoin an

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** Dusch v. Davis, 387 U.S. 112 (1967) is not authority for the issue in this case because the parties did not raise and this Court did not consider the applicability of the Voting Rights Act to that case.

election and the District Court refused. The Court of Appeals reversed and concluded that since the District Court should have enjoined the election, it was necessary to set aside the election and order a new election. The remedy approved in *Hamer* should be applied in *Fairley* and *Marsaw*. As this Court has stated, "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbaach, supra.* By enforcing §2870 as amended without complying with 42 U.S.C. §1973c, the State of Mississippi has again evidenced its intention to continue racial discrimination in voting. Only new elections properly held can cure that blight.

## CONCLUSION

For the reasons stated, this Court should reverse the orders of the District Court and grant the relief requested by appellants.

Respectfully submitted,

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## APPENDIX A*

"Section 2870.* Districts and boundaries.

Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one (1) member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

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*Section 2870 prior to its amendment in 1966 may be found in Volume 3 of the Mississippi Code at pp. 4-5. The 1966 amendment is reported in the 1966 Supplement to Volume 3 of the Mississippi Code at pp. 14-15.

Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and/or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

Provided further, however, that in any county in the state bordering on the Gulf of Mexico or Mississippi Sound and having a population in excess of eighty thousand (80,000) according to the last federal census, the issue of election heretofore provided for shall be determined by a majority of the qualified electors of the county, and if such majority fail to vote affirmatively, no new petition shall be considered for four (4) years. Each such election shall be based upon a petition of twenty- five per cent (25%) of the qualified electors of the county, and to which petition shall be attached a map or plat defining the boundaries of each beat as proposed by said map or plat, and the election thereon shall be on such proposal.

And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition, shall at its first meeting thereafter establish said proposed districts by order on its minutes, to be effective on the first day of January following, and in default thereof, may be commanded to do so by writ of mandamus.

When the districts are changed, by the qualified electors in an election as aforesaid, the board, of its own motion, shall not change or alter said districts within four (4) years thereafter.

The board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent; said order to be adopted and published in a newspaper having general circulation in the county at least twelve (12) months prior to the next general election wherein said supervisors are elected.

If twenty per cent (20%) of the qualified electors of the county shall present the board of supervisors with a petition objecting to such alternate method within sixty (60) days after the adoption and final publication of any such alternative method, then the board of supervisors shall call an election after publishing notice thereof in a newspaper published in the county once a week for at least three (3) weeks prior to such election and the question on the ballot shall be whether the entire electorate of the county shall be required to vote for the members of the board of supervisors at large, or whether the qualified electors in the said districts shall vote for the candidate in that district. If the majority of those voting vote that all the qualified electors shall be eligible to vote for candidates in each district, then thereafter all elections for members of boards of supervisors shall so be held. If not,

members of the boards of supervisors shall continue to be elected by the electorate of their respective districts and the board of supervisors shall not be permitted to adopt this alternative method of electing members of boards of supervisors again until two (2) years have transpired.

This act shall not be construed to effect any supervisors now holding office until the expiration and end of his present term of office."

*Material crossed out was deleted, and material underlined was added.

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub.L. 89–110, § 5, Aug. 6, 1965, 79 Stat. 439.

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Definitions

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

## CERTIFICATE OF SERVICE

I certify that I have this day mailed, via United States mail, postage prepaid, copies of the foregoing Brief of Appellants to the following:

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